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No. 02-905

IN THE

# Supreme Court of the United States

GENERAL COMMITTEES OF ADJUSTMENT GO-386 AND GO-245 OF THE UNITED TRANSPORTATION UNION,

AND

UNITED TRANSPORTATION UNION,

*Petitioners*,

v.

THE BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY, *et al.*

*Respondents*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

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**January 13, 2003**

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## QUESTION PRESENTED

The question presented is whether, as the court of appeals held, the right under Section 2 Third of the Railway Labor Act to designate a collective bargaining representative without interference by an opposing party is irrelevant to determining whether a rail union must engage in bargaining with a multi-carrier group as a "reasonable effort to make and maintain agreements" under Section 2 First of the Act, and whether such a duty to bargain under Section 2 First can be limited by the union's own restrictions on its agent's authority to entertain the other side's proposals.

## LIST OF PARTIES AND RULE 29 LIST

The parties to this proceeding are the petitioners United Transportation Union and its subordinate committees GO-386 and GO-245, and the following respondents (with parent companies and publically traded companies that own more than 10% of each respondent's stock):

1. The Burlington Northern and Santa Fe Railway Company

   Burlington Northern Santa Fe Corporation

2. Consolidated Rail Corporation

   Conrail, Inc.
   CSX Corporation
   Norfolk Southern Corporation

3. CSX Transportation, Inc.

   CSX Corporation

4. Kansas City Southern Railway Company

   Kansas City Southern Industries, Inc.

5. Norfolk Southern Railway Company

   Norfolk Southern Corporation

6. Union Pacific Railroad Company

   Union Pacific Corporation

7. Manufacturers Railway Company

   Busch Properties, Inc.
   Anheuser-Busch Companies, Inc.

8. Peoria & Pekin Railway Company

Conrail, Inc.
Consolidated Rail Corporation
CSX Corporation
Norfolk Southern Railway Company
Pennsylvania Lines LLC
Union Pacific Corporation

9. Portland Terminal Railroad Company

Burlington Northern Santa Fe Corporation
GATX Terminals Corporation
GATX Corporation
Union Pacific Corporation

10. Terminal Railroad Association of St. Louis

Burlington Northern Santa Fe Corporation
CSX Corporation
Canadian National Railroad
Illinois Central Railroad Company
Norfolk Southern Corporation
Union Pacific Corporation

11. Utah Railway Company

Arava Natural Resources Company, Inc.
Mueller Industries, Inc.

12. Winston-Salem Southbound Railway Company

CSXT Corporation
Norfolk Southern Railway Company

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OCTOBER TERM, 2002

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GENERAL COMMITTEES OF ADJUSTMENT GO-386 AND GO-245 OF THE UNITED TRANSPORTATION UNION,

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## RESPONDENTS' BRIEF IN OPPOSITION

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### STATUTE INVOLVED

Sections 2 First and 2 Third of the Railway Labor Act, 45 U.S.C. §§ 152 First, 152 Third, are quoted in Appendix E of the Petition.

### STATEMENT OF THE CASE

This case is about collective bargaining in the freight railroad industry, which is governed by the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq*. Railroads traditionally bargain with the rail unions on a multi-employer basis – a

process often called "national handling."[1] The issue here is whether requiring a union to engage in national handling as a "reasonable effort" under Section 2 First violates any representation rights it may have under Section 2 Third of the RLA.

The United Transportation Union ("UTU") is the designated representative of the crafts of conductors, trainmen and firemen on each of the nation's major railroads, including The Burlington Northern and Santa Fe Railway ("BNSF"). The UTU, through its constitution, has delegated its bargaining authority to a large number of subordinate "general committees," each of which purports to represent only fragments of these crafts on each railroad. The representational jurisdiction of these committees generally correlates to the geographic boundaries of former railroads that have long since been merged into larger systems. Pet. App. at 2a-3a, 18a.

In virtually every round of collective bargaining since the 1930s, the UTU and its predecessors have bargained with a coalition of freight railroads in national handling. The parties have almost always reached national agreements through this process. In the current round of bargaining, the railroads again proposed uniform changes to existing national agreements that cover all UTU-represented employees on the railroads in the multi-employer group. Pet. App. at 2a.

However, three UTU general committees – each claiming jurisdiction over only a portion of the UTU-represented employees on BNSF – refused to bargain alongside the rest of the UTU. Rather, each committee insisted on separate bargaining covering only a fraction of the employees of the railroad. As a result, the UTU and the committees disclaimed the authority to even discuss proposals that cover all UTU-represented employees of the multi-employer group. Nor would they discuss proposals covering all UTU-represented

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[1] The RLA specifically contemplates multi-employer bargaining. See 45 U.S.C. § 152 Second.

employees on BNSF. Pet. App. at 3a, 9a-10a.. Thus, the UTU is bargaining nationally for all employees except for those that these three BNSF General Committees purport to represent.

On November 24, 1999, the rail carriers sued the UTU in federal court in the District of Columbia, challenging this attempt to splinter negotiations. They contended that national handling is a "reasonable effort" required by Section 2 First of the RLA, 45 U.S.C. § 152 First, and the UTU is therefore obligated to bargain nationally for all the employees it represents in the multi-carrier group. The carriers relied on the D.C. Circuit's decision in *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line Railroad*, 383 F.2d 225 (D.C. Cir. 1967), which held that whether national handling is obligatory is a fact-based inquiry requiring examination of, *inter alia*, the parties' historical experience with multi-employer bargaining. *Id.* at 229. The railroads also argued that, even if the UTU may refuse to bargain nationally, it may not balkanize the craft-wide bargaining units on an individual carrier, such as BNSF.

On January 7, 2000, the three dissident committees of the UTU ("the Committees") filed their own lawsuit against BNSF and its national bargaining agent, and the cases were consolidated. On March 28, 2001, the District Court granted summary judgment for the Petitioners and denied the railroads' cross-motion, holding that Section 2 Third of the RLA, 45 U.S.C. § 152 Third, permits the UTU to refuse to engage in multi-employer bargaining if it designates agents who lack authority to bargain over national issues and is not acting in bad faith in doing so. Pet. App. at 21a-22a.

On April 13, 2001, the District Court modified its grant of summary judgment to add a declaratory judgment that the "General Committees are the parties with whom defendant [BNSF] must bargain." Pet. App. at 26a. The railroads appealed.

The National Mediation Board – the federal agency that is charged with assisting collective bargaining in the rail and air industries – filed a brief as amicus curiae in support of the

*Atlantic Coast Line* approach to disputes about national handling and the craft-wide representation issue. The airline industry likewise filed an amicus brief in support of the railroads' position on craft-wide bargaining.

The Court of Appeals reversed the decision of the District Court. It noted that the issue presented is "a relatively straightforward one: when and under what circumstances may a carrier or union under the RLA compel an opposing party to bargain on a national or local level * * * ?" Pet. App. at 3a. On that issue, the Court of Appeals concluded that its earlier decision in *Atlantic Coast Line* was controlling. Thus, the District Court must decide whether national bargaining qualifies as a "reasonable effort" under Section 2 First by conducting "an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical experience in handling any similar national movements." *Id.* at 5a (quoting *Atlantic Coast Line*, 383 F.2d at 229).

The Court of Appeals further held that the union's choice of bargaining agent under Section 2 Third is not relevant to the analysis of whether national handling is a "reasonable effort." Rather, the issue here is "the scope of bargaining – that is, whether it is locally or nationally handled – not the related but distinct question of designation of the bargaining representative." Pet. App. at 5a.

The Court of Appeals declined to determine *de novo* whether there were disputed issues of fact under a proper application of the *Atlantic Coast Line* test. It remanded the case to the District Court for that purpose. *Id.* at 6a.

No member of the Court of Appeals requested a vote on the union's petition for rehearing *en banc*. Pet. App. at 28a.

## REASONS FOR DENYING THE WRIT

The decision below does not raise any important issue of federal law that has not already been settled by this Court. Nor does it present a conflict among the circuits. Accordingly, the petition for certiorari should be denied.

### I. THIS CASE CONCERNS ONLY THE APPLICATION OF WELL-SETTLED LAW TO SPECIFIC FACTS

#### *A. Section 2 First is Applied On a Case-By-Case Basis*

The basic duties of parties engaged in collective bargaining under the RLA are well established. Under Section 2 First, which is "[t]he heart of the Railway Labor Act." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 377-78 (1969), carriers and employees are required –

> "*to exert every reasonable effort to make and maintain agreements* concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier * * * ."

45 U.S.C. § 152 First (emphasis added).

What is a "reasonable effort" turns on the particular circumstances of each case. In *Chicago & North Western Railway* v. *United Transp. Union*, the Court ruled that the duty to "exert every reasonable effort" is "enforceable by whatever appropriate means might be developed on a case-by-case basis." 402 U.S. 570, 577 (1971). Quoting the principal draftsman of the RLA, the Court explained:

> "We believe, and this law has been written upon the theory, that in the development of the obligations in industrial relations and the law in regard thereto, there is

> more danger in attempting to write specific provisions and penalties into the law than there is in writing the general duties and obligations into the law and letting the enforcement of those duties and obligations develop through the courts in the way in which the common law has developed in England and America."

*Id.*

Accordingly, the lower courts have developed a substantial jurisprudence concerning the meaning of "every reasonable effort" in the context of particular circumstances.[2]

*Atlantic Coast Line* was one such case. There the D.C. Circuit faced the question "when and under what circumstances" parties in the railroad industry may be required to engage in multi-employer bargaining as a "reasonable effort" under Section 2 First. See Pet. App. A at 3a. The court concluded that this form of bargaining may be a "reasonable effort" – and therefore obligatory – if it has been used successfully during previous negotiations over the same kind of issues, such as wages or benefits. 383 F.2d at 229. It reasoned:

> "What constitutes good faith bargaining in the railroad industry is colored by how parties have actually bargained in the past. The Railway Labor Act does not universally and categorically compel a party to a dispute to accept national handling over its protest. Such bargaining is certainly lawful, however. *Whether it is*

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[2] E.g., *Association of Flight Attendants* v. *Horizon Air Industries*, 976 F.2d 541 (9th Cir. 1992); *REA Express* v. *BRAC*, 358 F. Supp. 760, 771 n.43 (S.D.N.Y. 1973) (collecting cases). The only bright-line rule is that a party may not refuse outright to discuss legitimate proposals made by the other side. See , *e.g.*, *Virginian Ry.* v. *System Federation*, 300 U.S. 515, 548 (1937); *BLE* v. *Atchison, T. & S. F. Ry.*, 768 F.2d 914, 919 (7th Cir. 1985); *Piedmont Aviation* v. *ALPA*, 416, F.2d 633, 637 (4th Cir. 1969).

> *also obligatory will depend on an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical experience in handling any similar national movements.*" *Id.* (emphasis added).

This analysis tracks the rules established by this Court with respect to the proper application of Section 2 First. In applying a context-specific, history-based approach, the Court of Appeals recognized that, if disputes over specific issues have been successfully resolved by national handling in the past, it is by definition a "reasonable effort" to engage in that method of bargaining again.

That is not to say that national handling is necessarily the only effort that may be required. It might, for example, be a reasonable effort to engage in "dual track" negotiations – simultaneous local and national bargaining. But it is surely not reasonable to reject absolutely methods of bargaining that railroads and unions used successfully for decades.

### *B. Section 2 Third is Not Relevant to the Question Whether a Rail Union May be Required to Engage in National Handling*

Petitioners seek to escape the usual, fact-bound Section 2 First inquiry by arguing that their rights under Section 2 Third trump any obligation to bargain over proposals for a national agreement. Section 2 Third provides that "[r]epresentatives * * * shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other." 45 U.S.C. § 152 Third. According to Petitioners, this provision guarantees any subcommittee of a rail union the unfettered right to oppose national handling so that it may "press[] to impasse legitimate, but parochial, bargaining demands." Pet. at 17.

This argument is insubstantial and not worthy of review here. As the Court of Appeals correctly noted, Section 2 Third is about the identity of the bargaining agent, not the scope of bargaining (local or national or both) that may be required as a "reasonable effort" under Section 2 First. Pet. App. A. at 5a.

As explained in an earlier case raising this same argument during a similar dispute over national handling, Section 2 Third –

> "is intended to protect the identity of the representative, not the scope of his or her representation. * * * There is no indication in the language of the statute that suggests that it is intended to provide additional rights such as defining the bargaining form. The carriers have not interfered with the [union]'s right to name any individual as its bargaining representative. Whether there is a basis in the RLA for avoiding multi-employer bargaining or national handling, it does not arise from § 2 Third." *Alton & Southern Ry.* v. *BMWE*, 928 F. Supp. 7, 16 (D.D.C. 1996) (citation omitted).

Under this reading of Section 2 Third, the employees represented by the UTU are free to select anyone they want as their representative – including subordinate committees of the UTU – but those representatives must discuss the railroads' proposals in national bargaining when it is practically appropriate as a reasonable effort to reach agreement. This analysis reconciles the parties' rights under Section 2 Third with the parties' obligation to bargain under Section 2 First.

Nor does requiring national bargaining under Section 2 First indirectly force a party to choose a "national" bargaining agent or preclude bargaining over local issues. The employees' negotiators remain free to bargain for any kind of agreement they want. Carriers may seek nation-wide changes in agreements, but the employees can negotiate for local carve-

outs, special local rules, referral of issues to local handling, or anything else of that nature. National handling, if it is required, means only that the employees (and the railroads as well) must come to the table with negotiators authorized to reach *any* kind of agreement – local, national, or a hybrid – that the parties may ultimately decide is in their mutual best interest.

Thus, it is not true, as Petitioners suggest, that the approach used by the court below invites "freewheeling judicial interference" in the substantive terms of collective bargaining agreements. Pet. at 17, 20. The fact that national handling may be a "reasonable effort" in some circumstances says nothing about what the terms of the parties' agreements will be.

Under the Petitioners' approach, by contrast, it is impossible for the parties to negotiate about what the carriers propose, *i.e.*, an agreement that applies to *all* the carriers' employees represented by UTU. Indeed, Petitioners have even refused to try "dual track" local and national efforts to reach agreement. Thus, before negotiations even begin, Petitioners have ruled out any possibility of a national agreement. Even apart from the *Atlantic Coast Line* analysis, that is a clear violation of the most fundamental duty imposed by Section 2 First – the duty to at least discuss the other side's proposals. See *Virginian Ry.*, 300 U.S. at 548.

Setting aside the red herring of Section 2 Third, this case represents just another application of the approved case-by case approach to Section 2 First. There is nothing controversial about the lower court's approach or its conclusion that, under certain circumstances where history may point the way, the parties may be required to engage in national handling as part of their duty to make "every reasonable effort" to resolve disputes and reach agreement.

## II. THERE IS NO CIRCUIT CONFLICT OVER THE RELATIONSHIP BETWEEN SECTION 2 FIRST AND SECTION 2 THIRD

The Sixth and Eighth Circuits have held that individual railroads cannot be compelled to choose a multi-employer bargaining agent. *United Transp. Union* v. *Grand Trunk W. R.R.*, 901 F.2d 489 (6th Cir. 1990); *ARASA* v. *Soo Line R.R.*, 891 F.2d 675 (8th Cir. 1989). These decisions, Petitioners claim, create a circuit split that should be resolved by this Court.

But the decisions of the Sixth and Eighth Circuits are distinguishable from *Atlantic Coast Line* and this case, for they dealt with the issue of compelling a party to *join* a bargaining coalition – not compelling a party to *negotiate with* such a group. See *Alton & Southern Ry.* v. *BMWE*, 883 F. Supp. 755, 762 n.7 (D.D.C. 1995). Both carriers and unions sometimes bargain in coalitions. There are multi-employer groups, and there are multi-union groups. See *Soo Line*, 891 F.2d at 676. The Sixth and Eighth Circuit decisions stand for the proposition that neither a carrier nor a union may be forced to join such a coalition. See *Id.* at 678-79; *Grand Trunk Western*, 901 F.2d at 490.

That rule and the result below live comfortably together. No one is suggesting that the UTU must join a coalition. Nor are the General Committees being coerced into a multi-union coalition. They are already part of the UTU, the designated representative of the employees, and so their obligation to participate in national handling is not the equivalent of forcing a carrier (or union) to join a larger group. Nor is the UTU being told it cannot use its General Committees as bargaining agents in national handling. Rather, the issue is whether the UTU (regardless of whether it bargains through the General Committees or not) must negotiate with the multi-employer group over the carriers' proposals for national agreements. That

has no impact on the employees' Section 2 Third rights – the UTU remains their duly designated representative.

In short, *Atlantic Coast Line* can readily be reconciled with *Soo Line* and *Grand Trunk*: Section 2 First may require a union to negotiate with a multi-employer group – or a carrier to negotiate with a multi-union group – but neither a carrier nor a union may be forced to join such a group.[3] Hence there is no circuit conflict for this Court to resolve.

## III. THIS CASE IS NOT A "EXCELLENT VEHICLE" FOR REVIEW BY THIS COURT

Petitioners contend that, if the Court were inclined to reexamine the rules of collective bargaining under the RLA, this case is an "excellent vehicle" for doing so because it "raises a purely legal issue concerning the proper relationship between Sections 2 First and 2 Third." Pet. at 18. We have shown above that the interplay between those two statutory provisions is not unsettled and does not warrant review here. Moreover, at this stage the court of appeals has simply remanded the case to the district court for a determination whether, under the facts and circumstances of this case, national handling may be required. That determination may alter or even moot Petitioner's claims.

For example, the carriers contest the claim that the UTU and its Committees are operating in good faith. The record

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[3] At times during this litigation, Petitioners have argued that the carriers' interpretation of Section 2 First and Section 2 Third results in a one-way street – that unions may be forced into national handling, but carriers may not. In fact, the obligations are perfectly symmetrical. If the UTU joins a coalition of other unions, a railroad may not insist on negotiating with the UTU alone. Rather, the carrier can be forced to bargain with the multi-union coalition if, under *Chicago & North Western* and *Atlantic Coast Line*, it would be "practically appropriate" to do so.

facts show that the Committees refused to bargain with the carriers *at all* – in either local or national handling – which as discussed above is *per se* bad faith. See Joint Appendix ("J.A.") at 1025.[4] If the District Court were to conclude, for example, that Petitioners have refused outright to discuss the BNSF's proposals for craft-wide changes in agreements, then it need never reach the question whether national handling is obligatory under *Atlantic Coast Line*. Likewise, if the District Court decides that national handling is not "practically appropriate" in this case, then the matter would return to the Court of Appeals on the question whether the union may insist on bargaining for less than an entire craft on a single railroad system.

Finally, Petitioners exaggerate the frequency and scope of litigation over this issue. Prior to this case, there have been only a smattering of disputes about national handling over the course of the almost 70 years that carriers and their employees have been bargaining in this fashion. And despite the recent attempts by Petitioners to make national handling into a controversial process, in fact all of the recent previous rounds of bargaining have resulted in national agreements. Thus there is nothing about collective bargaining in the railroad industry that requires the Court's attention.

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[4] The Committees claimed that their refusal to bargain was justified because they had not been served with the carriers' written proposals. *Id.* They admitted, however, that the railroads sent them copies of the carriers' proposals, which is all that Section 6 of the RLA requires. *Id.* at 1021; 45 U.S.C. § 156.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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